Nos. 77-557, 77-606 and 77-622

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONSOLIDATION COAL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

FRANCIS LEO MARKS, PETITIONER
v.
UNITED STATES OF AMERICA

RAYMOND J. ZITKO, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 560 F. 2d 214. The opinions of the district court (Pet. Apps. D, E) are unreported.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 77-557.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1977. Petitions for rehearing were denied on August 29, 1977, in Nos. 77-606 and 77-622, and on September 16, 1977, in No. 77-577. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari in Nos. 77-606 and 77-622 to and including October 28, 1977. The petition for a writ of certiorari was filed on October 14, 1977, in No. 77-557, on October 26, 1977, in No. 77-606, and on October 28, 1977, in No. 77-622. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrants authorizing the search of various business premises owned by petitioner Consolidation Coal Company were supported by probable cause.

2. Whether petitioners Zitko and Marks have standing to challenge the search of company offices other than their own.

STATEMENT

1. On May 21, 1974, a United States Magistrate issued several warrants authorizing federal officers to search the general office and five field offices of the Consolidation Coal Company (the "Company") in Georgetown, Ohio, for evidence of violations of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801 *et seq.*[2] Based on lengthy affidavits of two officials of the

[2]Warrants were also issued to search three additional mining offices operated by the Company, but no evidence was seized at one site and material seized at the other two sites was voluntarily returned to the Company by the government.

Department of the Interior, William Holgate and Thomas Jeskey, the magistrate found probable cause to believe that the premises sought to be searched contained "exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples" (Pet. App. 45a) that had been used for the purpose of circumventing federal laws for monitoring atmospheric conditions in mines that cause "black lung" disease. See 30 U.S.C. 819(b), (c) and (d); 30 U.S.C. 842; 30 C.F.R., Part 70 (1974).

The next day, searches were conducted pursuant to the warrants at the designated offices, and a number of incriminating cassettes and records were seized (Pet. App. 46a-51a, 64a-66a, 72a-73a, 77a-81a, 86a-87a, 91a-93a). In August 1975, a multi-count indictment was returned by a grand jury of the United States District Court for the Southern District of Ohio charging petitioners with conspiracy, in violation of 18 U.S.C. 371, knowingly submitting false statements to the Department of the Interior, in violation of 30 U.S.C. 819(d), and willfully violating mandatory coal mine health and safety standards, in violation of 30 U.S.C. 819(b) and (c).

On June 11, 1976, without first holding an evidentiary hearing, the district court granted petitioner Consolidation Coal Company's motion to suppress all evidence seized in the six searches on the ground that the warrants were not supported by probable cause (Pet. App. D). In a separate order dated October 4, 1976, the district court held that petitioners Marks and Zitko, as corporate employees with supervisory responsibilities over the personnel and records at the offices searched, had standing to contest the six searches and therefore also suppressed the evidence as to them (Pet. App. F, No. 77-606). The government appealed, and the court of appeals reversed the suppression orders and remanded the case for further proceedings (Pet. App. A).

2. The search warrant affidavits submitted by William Holgate and Thomas Jeskey (Pet. App. 53a-56a, 58a-60a) stated that on May 15, 1974, they met with an unnamed former company employee who had worked at the Company's Franklin No. 25 and Franklin Highwall mines. According to the former employee, who spoke from personal knowledge, he had been instructed by his supervisors to maintain a supply of extra cassettes that contained respirable dust samples collected under controlled conditions. The former employee was directed to send all dust cassettes collected under actual mining conditions to technicians at the Company's laboratory, where the cassette could be opened and its contents analyzed. If a legitimate sample was found to offend the mandatory federal health standard, an artificially "clean" (low) sample, prepared by company technicians under controlled conditions, would be substituted and the authenticating documentation altered to conform (*id.* at 2a). The former employee said that he had been told by certain laboratory technicians, whom he identified by name, that similar practices were followed at other company mines located within the central region of Ohio.

Moreover, the former employee informed the federal inspectors that a list of all cassette samples actually collected as well as those subsequently voided was kept on a bulletin board at the environment office at the Franklin No. 25 mine, and he gave Inspector Jeskey a xerox copy of a list taken from the mine office showing that certain cassettes for collecting "high risk dust samples" (*id.* at 61a) had been voided. The former employee also said that a brown master book containing a listing of all voided and fictitious samples was kept in a desk drawer at the mine office, along with a number of cassettes containing control samples.

Finally, Inspector Jeskey's affidavit related that on May 16, 1974, the day after speaking with the former employee, he went to the Franklin No. 25 mine's environmental office, which was made available for use by federal mining inspectors. While there, Inspector Jeskey observed on the bulletin board a six-page list of respirable dust samples, including a record of at least six voided cassettes, which was similar to the xerox copy that he had previously received from the former employee. A short time later, Inspector Jeskey saw a company technician take a hard bound book from the desk drawer in the environmental office and place it in a pocket of the coveralls he was wearing, but the inspector was unable to ascertain what the book contained (Pet. App. 60).

ARGUMENT

1. These petitions challenge the court of appeals' reversal of the district court's suppression of evidence on grounds that the search warrants authorizing seizure of the evidence were not supported by probable cause. The decision of the court below places petitioners in the same position as if the district court had denied their motions to suppress. That ruling could not have been challenged by a pre-trial appeal (see *Cogen* v. *United States*, 278 U.S. 221), and the reasons of policy that counsel against permitting interlocutory appeals of denials of suppression motions similarly weigh against action by this Court to undertake interlocutory review of the suppression issue at this stage of the proceedings. See *Brotherhood of Locomotive Fireman & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327. At trial petitioners may be acquitted, in which event their claims will be moot. If, on the other hand, any petitioners are convicted and their convictions are affirmed, they will then be able to present all of their contentions to this Court by seeking review of the final judgment.

2. Petitioners contend (Pet. 19-20; Pet. No. 77-606, p. 14; Pet. No. 77-622, pp. 18-19) that the search warrants were not supported by probable cause because there was no showing that the former employee of the Company was credible or that his information was reliable, as required by this Court's decisions in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. We note at the outset that the *Aguilar-Spinelli* requirements were addressed to the particular problem of warrants issued on the basis of information provided by professional informants, and several courts have suggested that they should not be applied in "wooden fashion" (*United States* v. *Burke*, 517 F. 2d 377, 380 (C.A. 2) (Friendly, J.)) to other contexts where relevant information of criminal activity has been provided out of a sense of civic duty by an eyewitness to or a victim of the crime. See, *e.g.*, *United States* v. *Swihart*, 554 F. 2d 264, 268-269 (C.A. 6); *United States* v. *Rollins*, 522 F. 2d 160, 164 (C.A. 2), certiorari denied, 424 U.S. 918; *United States* v. *Darensbourg*, 520 F. 2d 985, 988-989 (C.A. 5); *Rutherford* v. *Cupp*, 508 F. 2d 122, 123 (C.A. 9), certiorari denied, 421 U.S. 933. Here, the information was given to the agents by a person who had witnessed the commission of illegal activities in his capacity as a corporate employee. Petitioners do not suggest that he was a paid informant, that he had a motive to falsify, or that he was involved in any way in the ongoing criminal enterprise. In such circumstances, all that the Fourth Amendment requires is that the magistrate have "a substantial basis for crediting the" informant. *United States* v. *Harris*, 403 U.S. 573, 581.

In any event, when the affidavits are read in a commonsense manner (*United States* v. *Ventresca*, 380 U.S. 102, 108) and "the usual inferences which reasonable men draw from evidence" are made (*Johnson* v. *United States*, 333 U.S. 10, 14), it is readily apparent that the *Aguilar-Spinelli* test was satisfied in this case.[3] As detailed above, the government's probable cause showing was based both upon the information supplied by a former company employee and upon the corroborative observations of a federal investigator.[4] The affidavits plainly afforded a sufficient basis to conclude that the former employee's information was reliable, since they stated that he had gained much of his information by first-hand observation, while other facts that he passed along to the agents could only have been obtained by personal knowledge. See *United States* v. *Jenkins*, 525 F. 2d 819, 823 (C.A. 6); *United States* v. *Jensen*, 432 F. 2d 861, 863 (C.A. 6). Thus, according to the affidavits, the employee was previously employed at the Franklin No. 25 mine, he had participated in the dust sampling program at the mine, and he had been told by his superiors to maintain a supply of extra dust cassettes collected under controlled conditions and to forward all cassette samples to the Company's Georgetown laboratory (Pet. App. 54a). The employee also had been informed by two named technicians at the laboratory that it was a company practice to submit fictitious dust samples to federal

[3]Of course, reviewing courts must also pay deference to a magistrate's determination of probable cause when, as here, there is a substantial basis for that finding. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 423; *Spinelli* v. *United States*, *supra*, 393 U.S. at 419; *Jones* v. *United States*, 362 U.S. 257, 270-271. In addition, as we argued in our petition for a writ of certiorari in *United States* v. *Karathanos*, certiorari denied, 428 U.S. 910, it is doubtful that the Fourth Amendment exclusionary rule is applied wisely to suppress evidence obtained by the good-faith execution of a warrant issued by a federal magistrate.

[4]Although the Jeskey affidavit was submitted specifically to support only the warrant for the search of the Franklin No. 25 mine, the magistrate properly considered it, along with the Holgate

inspectors in all the company's mines in the central Ohio district (*id.* at 54a-55a).[5]

Moreover, the reliability of the former employee's information was supported by its very detail. The employee described the records and their locations in the Franklin No. 25 mine office with specificity and also furnished a xerox copy of some of the records, including a list describing certain respirable cassette dust samples as "void." This information was substantially corroborated the next day when Agent Jeskey went to the mine office and observed many of the records that the informant had previously described. *Draper* v. *United States*, 358 U.S. 307, 313. Copies of some of the documents were attached as an exhibit to the affidavit. See *Andresen* v. *Maryland*, 427 U.S. 463, 478 n. 9. In sum, the affidavits here "contain[ed] a sufficient statement of the underlying circumstances" to establish probable cause to believe that the Company was violating the respirable dust standards of the Federal Coal Mine Health and Safety Act and that the information was based "on something more substantial than a casual rumor circulating in the underworld or

affidavit, in determining whether there was probable cause to search the Georgetown district office and the other field offices and in determining whether the informant and his information were reliable. The affidavits were submitted to the magistrate at the same time and related closely to the same investigation. In such circumstances, "[i]t would be hypertechnical for the [magistrate] not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day." *United States* v. *Serao*, 367 F. 2d 347, 350 (C.A. 2), vacated on other grounds, 390 U.S. 202. See also *United States* v. *Dudek*, 560 F. 2d 1288, 1292-1293 (C.A. 6), certiorari denied, No. 77-5626, January 16, 1978; *United States* v. *Manufacturer's National Bank of Detroit*, 536 F. 2d 699, 702 (C.A. 6), certiorari denied *sub nom. Wingate* v. *United States*, 429 U.S. 1039.

[5]These statements may have been against the technicians' penal interests. See *United States* v. *Harris, supra*, 403 U.S. at 580, 583-584.

an accusation based merely on * * * general reputation." *Spinelli* v. *United States, supra*, 393 U.S. at 416.[6]

3. Petitioners argue (Pet. 6-19; Pet. No. 77-606, p. 14; Pet. No. 77-622, pp. 14-21) that the court of appeals erred in holding that, in light of the "regulatory character" of the searches in this case, issuance of the search warrants could be sustained "upon a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967)" (Pet. App. 7a-8a). As we have demonstrated above, however, the warrants were supported by the traditional standard of probable cause applicable to criminal investigative searches. It is therefore unnecessary for this Court to reach the question whether the court below erred in upholding the search

[6]Petitioners contend (Pet. 19-20) that the affidavits were deficient because, apart from the representations attributed to the laboratory technicians, they contained only "neutral" information. It is unclear why petitioners believe that the magistrate was obliged to disregard the technicians' information, since it is obvious from the affidavits that the former employee learned it from personal discussions, and the technicians would not likely have fabricated a story contrary to their own penal interests. In any event, the other facts supplied to the agents were hardly "neutral." The former employee's supervisor had told him to maintain a supply of fictitious dust sample cassettes and to send all samples collected to the Georgetown laboratory. Moreover, the informant saw (and xeroxed) a company record showing that several sampling cassettes had been "voided," and Agent Jeskey himself corroborated these details. In light of the legal requirement that a mine operator must "promptly collect and transmit" *all* dust samples to the Department of the Interior (see 30 C.F.R. 70.260(a) (1974); 30 U.S.C. 814(i)), this information alone was sufficient to give the agents probable cause to believe that the monitoring provisions of the Act were being violated.

warrants under a somewhat different standard of probable cause.[7]

In any event, regardless of the correctness of the court of appeals' conclusion that the searches of the Company's property may be sustained by the administrative search rationale of *See* and *Camara* v. *Municipal Court,* 387 U.S. 523,[8] this case is plainly governed by *United States* v. *Biswell,* 406 U.S. 314, and *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, and, hence, the searches could properly have been undertaken without a warrant.

Colonnade Catering involved the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant or the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. After

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[7]Thus we agree with the concurring opinion of Judge Engel, who concluded that, because the government agents' affidavits met "the more stringent standards of *Aguilar* and *Spinelli,*" there was no occasion to consider the administrative search question in this case (Pet. App. 18a).

[8]Unlike a search conducted pursuant to a criminal investigation, the administrative searches at issue in *Camara* and *See* were "aimed at securing city-wide compliance with minimum physical standards for private property" (*Camara* v. *Municipal Court, supra,* 387 U.S. at 535). Hence, "the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or correct in a short time" (*United States* v. *Biswell,* 406 U.S. 314, 316) and that "may not be apparent to the inexpert occupant himself" (*Camara* v. *Municipal Court, supra,* 387 U.S. at 537); the searches were "neither personal in nature nor aimed at the discovery of evidence of crime" (*ibid.*). Here, by contrast, the inspection was aimed at uncovering evidence of criminal conduct in the Company's administration of the required federal regulatory scheme to monitor the causes of "black lung" disease and at seizing documents and other materials demonstrating corporate non-compliance with the Act, rather than merely searching for physical safety or health hazards.

reviewing the history of federal involvement in the regulation of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and had "broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" (397 U.S. at 76). Although the Court invalidated the search in that case, it was because Congress had not specifically authorized warrantless entries in the applicable regulatory statute and had instead provided an alternative remedy, not because the Fourth Amendment would have barred such inspections if legislatively authorized. *Id.* at 77.

Similarly, in *Biswell,* the Court was faced with the warrantless search of a locked commercial storeroom during business hours as part of a federal gun control program authorized by 18 U.S.C. 923(g), which resulted in the seizure of unlicensed firearms from a federally licensed gun dealer. While federal regulation of firearms was not as deeply rooted in history as was governmental control of liquor, the Court sustained the warrantless inspection program challenged in that case because of the program's importance in the prevention of violent crime, the fact that a warrant requirement would have impeded enforcement in light of the ease with which statutory violations could be concealed, and the limited nature of the inspection's interference with the gun dealer's right to privacy. 406 U.S. at 315-316.[9]

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[9]As the Court observed (406 U.S. at 316):

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

Here, as in *Biswell,* "[l]arge interests are at stake" (406 U.S. at 315), and Congress has responded to the dangers involved in coal mining—"the most hazardous occupation in the United States" (H. R. Rep. No. 91-563, 91st Cong., 1st Sess. 1 (1969)) and an "industry [with] a history of close federal regulation" (Pet. App. 13a)[10]—by requiring "frequent inspections and investigations in coal mines each year for * * * enforcement purposes" (H.R. Rep. No. 91-563, *supra,* at 7). To combat the frequent occurrence of lung disease associated with unhealthful mining practices, Congress enacted strict measures for monitoring the air in coal mines (30 U.S.C. 842) and explicitly gave federal authorities the right to enter any "coal mine" to conduct inspections and investigations to ensure compliance with the federal regulations (30 U.S.C. 813(a) and (b)). To guarantee that the Act's broad remedial purposes would be effectuated, Congress expansively defined a "coal mine" to include all surface structures and facilities used in or resulting from the work of extracting coal (30 U.S.C. 802(h)).

Thus, Congress has adopted "a regulatory inspection system of business premises that is carefully limited in time, place, and scope" (406 U.S. at 315). The searches here were conducted by federal mine inspectors pursuant to this important regulatory scheme during regular business hours at surface structures intimately tied to the work of extracting coal and where records relating to the federal respirable coal dust sampling program could be found. In sum, even though the searches were authorized by warrants issued upon probable cause, they were independently sanctioned by a valid inspection statute

[10]See *Youghiogheny and Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45, 49-50, 52 (S.D. Ohio) (three-judge court).

enacted by Congress and could have been carried out even in the absence of probable cause or a warrant.[11]

4. Petitioner Marks asserts (Pet. No. 77-606, pp. 15-20) that he has standing to contest each of the six searches.[12] This issue was not decided by the court of appeals (Pet. App. 5a n. 7) and need not be considered by this Court, since, as we have shown above, the searches of the Company's property did not violate the Fourth Amendment. Petitioner's claim is, in any event, without merit.

Throughout the course of these proceedings, the government has acknowledged that petitioners Marks and Zitko have standing to object to the introduction of evidence seized from their personal offices at the Company's district headquarters at Georgetown, Ohio. Relying on *Mancusi* v. *DeForte*, 392 U.S. 364, however, petitioner Marks contends that he also has standing to challenge the legality of the searches at the five mine sites because, as an environmental officer for the Company, he

[11]Because these searches were in fact conducted pursuant to valid warrants, there is no reason to hold these cases pending disposition of *Marshall* v. *Barlows, Inc.,* No. 76-1143, argued January 9, 1978, which involves a challenge to the warrantless regulatory search of business property authorized by the Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. 651 *et seq.*

Similarly, the decision below does not conflict with *Midwest Growers Co-op. Corp.* v. *Kirkemo,* 533 F. 2d 455 (C.A. 9). The Federal Coal Mine Health and Safety Act, unlike the regulatory statute in *Midwest Growers,* expressly grants officers a "right of entry to, upon, or through" the regulated premises as well as the power to conduct "inspection[s]" and "investigation[s]" (30 U.S.C. 813(b)(1)), and the warrants here conformed to the standard of probable cause required in criminal investigations.

[12]Although petitioner Zitko does not raise the standing issue in this Court, his position is identical to that of petitioner Marks, and our argument is equally applicable to both petitioners.

was ultimately responsible for its respirable dust records and periodically visited the five field offices. This contention is incorrect.

In *Brown* v. *United States,* 411 U.S. 223, 229, the Court repeated the general rule that a defendant is not a "person aggrieved by an unlawful search or seizure" (Fed. R. Crim. P. 41(e)) unless he is able to show that he was on the premises at the time of the contested search or seizure, had a proprietary or possessory interest in the premises searched, or was charged with an offense that included, as an essential element, possession of the seized evidence at the time of the alleged Fourth Amendment violation. This rule was applied in *DeForte* in the context of the search of a private office shared by DeForte and other union officials and the seizure of union records. In concluding that DeForte could properly challenge the search, the Court observed that "[i]t has long been settled that one has standing to object to a search of his office [and] * * * that the situation was not fundamentally changed because DeForte shared an office with other union officers" (392 U.S. at 369). The Court specifically noted that DeForte was present when the search occurred (*id.* at 365), that he had "spent 'a considerable amount of time' in the office and that he had custody of the papers at the moment of their seizure" (*id.* at 368-369; footnote omitted). In these circumstances, the Court concluded that he had "a reasonable expectation of freedom from governmental intrusion" (*id.* at 368) in the area searched. See *United States* v. *Stull*, 521 F. 2d 687, 692 (C.A. 6), certiorari denied, 423 U.S. 1059.

Thus, the simple allegation of a "supervisory" responsibility over the general area searched does not give a corporate official standing to contest the seizure of corporate records, because *DeForte* requires "a demonstrated nexus between the area searched and the work

space of the defendant." *United States* v. *Britt,* 508 F. 2d 1052, 1056 (C.A. 5), certiorari denied, 423 U.S. 825. See also *Lagow* v. *United States,* 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858. Here, there was no such nexus between petitioners Marks or Zitko and the five field offices. Neither petitioner was present at any of these sites when the searches occurred and neither of them maintained a personal office in those locations. They therefore have standing to seek suppression only of the evidence obtained at their own work areas in the Company's district office at Georgetown.[13]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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[13]Petitioner Marks (Pet. No. 77-606, pp. 19-20) also misperceives the automatic standing rule announced in *Jones* v. *United States,* 362 U.S. 257, 263. Petitioner was not charged with any offense that contains, as an essential element, possession of the seized evidence at the time of the contested search and seizure. Contrary to his apparent belief, he cannot claim standing merely because the seized evidence might be introduced against him at trial.

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